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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GAYLORD ALLEN MCKENZIE, JR., Defendant and Appellant.	E070361 (Super.Ct.No. RIF1701797) OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor, Judge. Affirmed.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Lynne McGinnis and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Gaylord Allen McKenzie, Jr., was convicted of forcible sodomy of a child 14 years of age or older and sentenced to 11 years in prison. On appeal, he asserts two claims of instructional error, arguing the trial court improperly (i) instructed the jury that the prosecution was not required to prove the exact date of the offense despite his presentation of an alibi defense and (ii) failed to instruct on the lesser included offense of sodomy with a person under 18. We conclude both claims lack merit and affirm.

I

FACTS

In February 2018, the Riverside County District Attorney filed an information charging McKenzie with one count of forcible sodomy of John Doe, a child 14 years of age or older, "on or about 1/1/2012 through and including 12/31/2012," in violation of Penal Code section 286, subdivision (c)(2)(C). McKenzie pled not guilty.

At trial, Doe, who was then 20 years old, said McKenzie had raped him in 2012, when he was 14 years old. At the time, Doe lived in a two-story house in Perris with his parents and four siblings.

Doe's father met McKenzie sometime in June 2012 at a neighbor's house. When McKenzie mentioned he had been in the Marines, Doe's father invited him to their house to talk to his oldest son, Doe's brother, about a career in the military. McKenzie met the entire Doe family that day and stayed for a number of hours, drinking with Doe's father.

The following day, McKenzie came by the house again, and Doe's father invited him to join them for dinner that night to celebrate his daughter's sixth-grade graduation.

After dinner, McKenzie went back to their house and drank with Doe's father. McKenzie said he had nowhere else to stay, so Doe's father let him sleep on one of the couches in the living room.

At the time, Doe was regularly sleeping in the living room because his older brother took up all the space in the room they were supposed to share. Doe said he and McKenzie slept on separate couches that night and he felt uncomfortable sleeping in the same room as "somebody [he] didn't know." He said he kept waking up throughout the night, thinking he was hearing noises. The first time he woke, McKenzie wasn't in the room and the front door was unlocked, so he locked it. The second time, he saw McKenzie coming down the stairs. The third time, McKenzie once again was not in the living room. Doe was so scared he armed himself with a knife from the kitchen, and searched the house. Finding no one, he went back to sleep on the couch.

The next time Doe woke, a tall man was lying on top of him, pulling his shorts and underwear down. He tried to pull them back up, but the man pushed his head into the couch and sodomized him. Doe couldn't remember how long it lasted because he eventually "blacked out" from the pain and fear.

After some time, Doe regained consciousness and saw McKenzie lying on the other couch. Still in pain, he tried to crawl upstairs to his family, but he didn't make it and ended up falling asleep in the middle of the floor. Doe said he knew it was McKenzie who had raped him because he was the only other person in the living room and also because he was tall, like his attacker.

The next day, Doe was in pain and bleeding from his anus. At some point that day, McKenzie came by the house again to look for the keys to his truck. Doe almost told his older brother about the rape then, but decided against it for fear his brother would try to fight McKenzie and get hurt.

Doe's father testified he noticed a change in Doe's behavior right around that time. He said Doe used to be happy and outgoing, but became quiet and reserved beginning about June 2012. Doe started locking himself in his room and burning his arms with cigarette lighters. Doe said he spent the next few years feeling confused, helpless, and unable to sleep. He drank and smoked marijuana heavily in an attempt to block out those feelings. A couple of years later, because he "couldn't stop thinking about it," he finally told one of his sisters what had happened. He asked her not to tell anyone because it made him feel ashamed. The sister waited a few weeks, then alerted their mother. Doe's father said when he finally talked to his son about the incident, he said he had tried to call out for help when McKenzie was on top of him, "but the words wouldn't come out."

McKenzie did not take the stand. He presented an alibi defense through a correctional deputy who testified he was in jail from June 10 to July 24, 2012.

II

ANALYSIS

A. *Instructions Regarding Alibi and Date of the Offense*

McKenzie argues that because he had presented an alibi defense, the trial court erred by instructing the jury that the prosecution was not required to prove the exact time

of the sodomy. (CALCRIM No. 207.) We disagree. It is improper to give CALCRIM No. 207 only when the defense is lack of opportunity, or alibi, and the evidence establishes the offense occurred on a *particular* day. (*People v. Jennings* (1991) 53 Cal.3d 334, 358-359 (*Jennings*).) Here, the evidence established that the sodomy occurred *sometime* in June 2012 and McKenzie's alibi covered only part of that month. Because his alibi was partial, the court could properly instruct the jury with CALCRIM No. 207.

1. *Additional facts*

At trial, the jury heard the following evidence regarding the timing of the offense. Doe was sure the incident happened on a Saturday night in 2012, after the graduation dinner, but could not remember which month or even which season. Doe's father was sure the dinner was in June, but could not recall which exact day. He thought the dinner might have happened the day after the graduation, but having not attended the ceremony, he couldn't be sure. Doe's older brother remembered McKenzie coming to their house sometime in 2012, but couldn't remember which month. On June 21, 2012, Doe's mother posted online a photograph of her daughter with the caption "My baby graduate from the sixth grade." She said she thought she posted the photo the same day as the graduation, but, because the events occurred six years ago, it was also possible she was misremembering and the graduation took place on a different day. Though no one could recall the exact date of the dinner, three witnesses—Doe, his father, and his brother—

identified McKenzie as the person who had gone to dinner with them and slept at their house afterward.

Defense counsel introduced a calendar from the elementary school for the 2011-2012 year, which indicated the last day of school was June 14. The current assistant principal of the elementary school, who did not work there during the relevant year, testified it was "not unusual" for the graduation ceremony to take place on the last day of school.

Before the court instructed the jury, defense counsel said she had no objections to any of the instructions. As relevant here, the trial court instructed the jury with CALCRIM No. 207, stating: "It is alleged that the crime occurred between January 1, 2012 and December 31, 2012. The People are not required to prove that the crime took place exactly in that time period, but only that it happened reasonably close to that period." The court also instructed the jury with CALCRIM No. 3400: "The People must prove that the defendant committed sodomy by force. The defendant contends he did not commit this crime and that he was somewhere else when the crime was committed. The People must prove that the defendant was present and committed the crime with which he is charged. The defendant does not need to prove he was elsewhere at the time of the crime. [¶] If you have a reasonable doubt about whether the defendant was present when the crime was committed, you must find him not guilty."

During closing argument, the prosecutor urged the jury to reject McKenzie's alibi defense because it didn't cover the entire relevant period. "[T]he truth is we don't know

when [the graduation] happened. We just don't know. That's why the date range of the crime is January 1st, 2012, to December 31st, 2012. We don't know. [¶] . . . [¶] All we know is that they celebrated . . . [¶] . . . [I]t was some Saturday. Was it June? Was it May? Everyone thinks it's June. We don't know, and it doesn't matter. We know that the graduation was not the same day as the [celebratory meal]." He pointed out that no one could remember the date of the dinner either. Thus, if the jury believed the witnesses' testimony that McKenzie (and not someone else) had attended the dinner, it could conclude the outing had occurred sometime in June *before* the last day of school (June 14).

Defense counsel argued it was "factually impossible" that McKenzie was the perpetrator. He argued that the night of the offense—the night of the celebratory dinner—was either June 14 or 21, both days McKenzie was in custody.

In rebuttal, the prosecutor reiterated that there was no evidence establishing the family had gone to dinner the same day or week as the graduation ceremony. He argued the case came down to identification because McKenzie claimed he wasn't at Doe's house that night, but three witnesses said he was. He argued the only reasonable conclusion to draw was that McKenzie had gone to jail sometime after he molested Doe.

2. *Analysis*

McKenzie acknowledges that, ordinarily, the prosecution need not plead or prove the exact time of the commission of an offense. He argues that in his case, however, the provision of both CALCRIM Nos. 207 and 3400 confused the jurors into believing the timing of the crime was "inconsequential," when in fact it was crucial because he had presented an alibi.

First of all, we note McKenzie did not object to the use of CALCRIM No. 207. Typically, when a defendant fails to object and give the trial court a chance to address the alleged error before instructing the jury, they forfeit their challenge to the instruction on appeal. (E.g., *People v. Dunkle* (2005) 36 Cal.4th 861, 895-897.) But in any event, there was no instructional error in this case.

"CALCRIM No. 207 accurately states the general rule that when a crime is alleged to have occurred 'on or about' a certain date, it is not necessary for the prosecution to prove the offense was committed on that precise date, but only that it happened *reasonably close* to that date." (*People v. Rojas* (2015) 237 Cal.App.4th 1298, 1304, italics added; see also Pen. Code, § 955 ["the precise time at which the offense was committed need not be stated in the accusatory pleading, but it may be alleged to have been committed at any time before the finding or filing thereof"].) "[T]here is no authority for the proposition that when a defendant offers a partial alibi, the witness must specify that the crime occurred outside the period covered by the alibi." (*People v. Fortanel* (1990) 222 Cal.App.3d 1641, 1646.) "It is only 'when the prosecution's proof

establishes the offense occurred on a particular day *to the exclusion of other dates*, and when the defense is alibi (or lack of opportunity), [that] it is improper to give the jury an instruction using the 'on or about' language." (*Rojas*, at p. 1304, quoting *Jennings*, *supra*, 53 Cal.3d at pp. 358-359.)

Here, the charging document alleged the sodomy took place sometime in 2012 and the evidence adduced at trial did not establish the offense occurred on any particular date within that time frame. All of the prosecution's witnesses agreed the offense happened in 2012 on the evening of a dinner to celebrate a sixth-grade graduation. Doe's father remembered that dinner had taken place sometime in June, but that was the most specific any witness could be about when the offense occurred. At trial, defense counsel made much of the fact that the last day of school was June 14—when McKenzie was in jail—but the evidence did not establish the dinner took place on the same day as the last day of school. In other words, McKenzie provided an alibi for June 10 through July 24, but the evidence did not foreclose the possibility the family went to dinner to celebrate the graduation in early June, before the last day of school.

CALCRIM No. 207 states the general rule that the prosecution does not have to prove the exact date of the offense, and CALCRIM No. 3400 instructs that the prosecution must prove the defendant was present at the scene of the crime and committed the crime. Because the evidence did not establish which day in June the sodomy occurred and McKenzie's alibi did not cover the entire month, nothing about the two instructions was conflicting. In other words, because McKenzie's alibi covered only

part of the time during which the crime could have occurred, the prosecutor was correct to argue the key issue was the identity of the person who slept at Doe's house after the graduation dinner. Three witnesses identified that person as McKenzie.

The jurors did not ask any questions regarding the time of the offense or McKenzie's alibi, and in the absence of an indication the jurors were confused, "'[w]e presume [they] are intelligent and capable of correctly understanding, correlating, applying, and following the court's instructions.'" (*People v. Acosta* (2014) 226 Cal.App.4th 108, 119.) In addition, the jurors also heard correct instructions on the elements of forcible sodomy, the presumption of innocence, and the prosecution's burden of proof. Taken together, these instructions conveyed that the prosecution had to prove beyond a reasonable doubt that McKenzie committed the crime, which necessarily would entail proving he was at Doe's house (and not in jail) on the night of the crime. We conclude McKenzie's claim of error fails.

B. *Lesser Included Instruction*

The trial court instructed the jury on the lesser included offense of simple battery. McKenzie argues the court erred by not also instructing on the offense of sodomy with a person under 18, in violation of Penal Code section 286, subdivision (b)(1). Assuming that offense is a lesser included offense of forcible sodomy of a child 14 or older, we nevertheless conclude the trial court was not required to instruct on it.

"[W]e review independently the question whether the trial court failed to instruct on a lesser included offense," considering the evidence in the light most favorable to the

defendant. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215; *People v. Turk* (2008) 164 Cal.App.4th 1361, 1368, fn. 5.) A trial court must instruct on a lesser included offense only when there is "substantial evidence raising a question as to whether all of the elements of the charged offense are present." (*Cole*, at p. 1215.) Substantial evidence in this context is evidence from which a reasonable jury could conclude that the defendant committed "the lesser offense, *but not the greater*." (*People v. Breverman* (1998) 19 Cal.4th 142, 162, italics added; *People v. Wyatt* (2012) 55 Cal.4th 694, 702-703 ["the obligation to instruct on a lesser included offense does not arise when there is no evidence that the offense was less than that charged"].) In other words, instruction on a lesser included offense is not warranted in circumstances where "[i]f the jury believed [the prosecution's witnesses], the elements of [the charged crime] were established." (*People v. King* (2010) 183 Cal.App.4th 1281, 1319.)

Such was the case here. Viewing the record in the light most favorable to McKenzie's claim, the only testimony regarding the nature of the sodomy came from Doe, who said McKenzie had mounted him in his sleep and held him down while he sodomized him. McKenzie's defense was that he was in jail when the sodomy occurred, so he couldn't have been the perpetrator. The difference between forcible sodomy and sodomy with a person under 18 is the use of force or fear to accomplish the crime. (Pen. Code, § 286, subds. (b)(1) & (c)(2)(C).) Here, neither McKenzie, nor any other witness, gave an account of the sodomy that conflicted with Doe's or suggested the sodomy was accomplished without force or fear.

McKenzie claims the record does raise a question as to whether he used force or fear because "Doe claimed that he was sodomized in a house filled with his family members, but never cried out for help despite the fact that he was supposedly terrified of [McKenzie] before the crime was committed." This argument is unavailing not only because resistance is not required to prove forcible sexual assault (*People v. Babcock* (1993) 14 Cal.App.4th 383, 387), but also because Doe said he did try to resist, but McKenzie, who was bigger and stronger, overcame his efforts by pushing his head into the couch. Simply put, this record contains no basis for the jury to believe Doe's testimony that McKenzie sodomized him, but disbelieve his testimony that McKenzie pushed his head into the couch. We therefore conclude the trial court had no duty to instruct the jury on the offense of sodomy with a person under 18 years old.

III

DISPOSITION

We affirm the judgment.

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SLOUGH
Acting P. J.

We concur:

RAPHAEL
J.

MENETREZ
J.